1980

The Legacy of Clinical Education: Theories about Lawyering

Carrie Menkel-Meadow

THE LEGACY OF CLINICAL EDUCATION: THEORIES ABOUT LAWYERING

CARRIE MENKEL-MEADOW*

I. INTRODUCTION

THE DEVELOPING CLINICAL LEGAL EDUCATION MOVEMENT has been concerned with the central question "What is it that lawyers do?" This query has elicited a variety of answers that suggest some new theories about the role of the lawyer and the practice of law in contemporary society.

Some of these theories are closely associated with individual proponents or schools of law while others are the product of collaborative or anonymous effort. Clinicians have forged these new theories in an effort to incorporate the knowledge of those who have gone before them with explanations of their own experiences and observations of their own new reality. In order to fully understand the phenomenon of lawyering, clinicians must now join a discourse with each other and with other legal scholars and lawyers to enrich the inquiry into what lawyers do and to consider which theories will most usefully explain lawyering behavior.

In the hope of stimulating this discussion, this article will examine some of the various schools of thought about what lawyers do. It is offered as a commentary on the beginnning of a philosophy or sociology[1] of lawyering that is derived from the clinical movement which will survive long after the pedagogical and political disputes about clinical methodology have been resolved. This is a subjective study which incorporates my own interpretations of the concepts of the various schools of thought. I describe the approaches to or theories about lawyering and their "creators" as I know them, recognizing that some major theories, schools and people may not for one reason or another have come to my attention.[2] The schools of thought discussed may suffer from some distortion[3] both in their description and their attributions. Yet, even a

*Acting Professor of Law, University of California at Los Angeles. A.B., Barnard College, Columbia Univ.; J.D., University of Pennsylvania.

[1] One commentator has called this the phenomenonology of what lawyers do. *See* Simon, *Homo Psychologicus: Notes on a New Legal Formalism*, 32 STAN. L. REV. 487 (1980).

[2] This is one of the problems caused by the limited body of scholarly writing in the clinical field. The reader may note that many of the sources cited herein are "unpublished" or "forthcoming."

[3] This approach follows a now familiar tradition in legal scholarship—the discussion of models or "ideal types" in legal analysis which may be used at least for heuristic purposes, if not for total reliability of description. *See, e.g.*, R.

slightly distorted description of an approach to lawyering can help us to frame and to respond to questions about the lawyer's function in a legal system. Although there is controversy surrounding different views about the pedagogy or methodology of clinical legal education,[4] the focus of this discussion is on the theories of what it means to be a lawyer in our legal system, as they have developed from the clinical experience.

II. TOWARD MACRO AND MICRO THEORIES OF LAWYERING

Most clinicians would probably agree that the core subject of instruction and interest is the role of the lawyer in employing the skills and practices needed to advise and represent clients. Most clinicians would not hesitate to add that the lawyer employs these skills in a highly structured world commonly called "the legal system." Any inquiry into what lawyers do must necessarily consider what the legal system permits, demands, requires and provides. Thus, most theories,[5] explanations or descriptions of what lawyers do may be divided into two, somewhat arbitrary, categories—*micro* theories, which focus on the role and behaviors of the individual lawyer, and *macro* theories, which focus on the lawyer's interaction with the legal system, and the impact of lawyers on the larger world.

Obviously, long before the present clinical movement began, lawyers, legal scholars, anthropologists, sociologists, and political scientists examined these two aspects of lawyering.[6] But the clinical movement has spurred a variety of new approaches to our understanding about the role of the lawyer and the function of the legal system. Indeed, what has characterized the thinking of clinicians has been the systematic scrutiny of all aspects of the lawyering role and function—no matter how small or large a slice of the lawyering process to be examined. This reflection on and scrutiny of the lawyer's work has been undertaken out of necessity as well as out of interest, for in order to teach students how to

---

UNGER, KNOWLEDGE AND POLITICS (1975); Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29; R. Abel, Informal Alternatives to Courts as a Mode of Legalizing Conflict (forthcoming, on file with the author).

[4] There is, aside from the arguments about simulation versus client-centered clinical education and in-house versus out-of-house fieldwork programs, a bona fide dispute about the existence of a discrete clinical methodology in legal education. *See* Condlin, *The Myth of the Clinical Methodology*, 2 CLINICAL LEGAL EDUC. PERSPECTIVE 9 (1978).

[5] The words "theories about lawyering" are used cautiously. The models, explanations, conceptual frameworks or principles about lawyering described in this essay may not rise to the level of theories in the most abstract sense of the term. The reader may substitute any other term which more accurately reflects his or her sense of the subject matter.

[6] For a comprehensive guide to this literature, see Abel, *The Sociology of American Lawyers—A Bibliographic Guide*, 2 LAW & POLICY Q. 335 (1980).

be lawyers, clinicians have had to ask themselves what it is that lawyers do.

As more and increasingly diversified people have asked themselves questions about what lawyers do, certain theoretical patterns have emerged. Those who focus on the micro or individual level of lawyering emphasize the concepts of role and process, *i.e.*, what does the lawyer do, for whom, in what context, and why? Thus, for those using the *micro*scope, the lawyer is decision-maker,[7] advisor,[8] fact developer,[9] advocate,[10] friend,[11] investigator,[12] and organizer.[13] Those who focus on the macro level of lawyering have emphasized the concepts of function and substance, *i.e.*, what can law and lawyers accomplish? For them the lawyer is seen as an instrument of dispute resolution,[14] an agent of social change,[15] a medium for greater democratic participation,[16] and as a mechanism of social control[17] and symbol of stylized ritual.[18]

It is still too early to tell which theory or combination of theories best explains the purposes and functions of the lawyer, but these theories have stimulated some important questions. These common questions focus not only on what lawyers do, but also on how lawyers learn, make decisions, and interact with other participants in the legal system. Other questions which are implicated in this inquiry are how well does the lawyer perform her duties, how is the lawyer constrained by the larger system in which she operates, for whom does the lawyer work, by what rules or norms should the lawyer's work be governed and evaluated, how does the lawyer relate to the substantive law that is practiced and to what end does the lawyer work. Many clinicials have addressed these questions and offered interesting insights into the legal profes-

---

[7] Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979); A. Amsterdam, Memorandum to Stanford Law School Faculty (July 27, 1973).

[8] D. BINDER & S. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH (1977); L. BROWN & E. DAUER, PLANNING BY LAWYERS: MATERIALS ON A NON-ADVERSARIAL LEGAL PROCESS (1978).

[9] *See* G. BELLOW & B. MOULTON, THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY 304-05 (1978).

[10] *Id.* at 826-965.

[11] *See* Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976).

[12] *See* G. BELLOW & B. MOULTON, *supra* note 9, at 339-407.

[13] *See* Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049 (1970).

[14] *See* Abel, *A Comparative Theory of Dispute Institutions in Society*, 8 LAW & SOC. R. 217 (1973); R. Abel, *supra* note 3.

[15] *See* Bellow, *Turning Solutions Into Problems: The Legal Aid Experience*, 34 NLADA BRIEFCASE 106 (1977); Rabin, *Lawyers For Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207 (1976).

[16] *See* Wexler, *supra* note 13; R. Abel, *supra* note 3.

[17] *See* Bellow, *supra* note 15; Wexler, *supra* note 13.

[18] *See* G. BELLOW & B. MOULTON, *supra* note 9 at 2-34.

sion. The following sections will examine *micro* and *macro* theories, though categorization will at times seem artificial, and offer some suggestions for further inquiry into the question of what lawyers do. We may ultimately have more questions than answers, but that is how theories are born and tested.

III. MICRO THEORIES: THE INDIVIDUAL LAWYER—PROFESSIONAL SKILLS AND INTERPERSONAL PROCESS

A. *The Notion of "Role" in Lawyering*

No discussion about theories of lawyering could begin without reference to Gary Bellow, generally regarded as the theoretical father of clinical education.[19] Although Bellow has written on many aspects of clinical education, including pedagogy,[20] course description[21] and lawyering process,[22] his writing on the individual lawyer level has been most notable for the attention it pays to the notion of role. In a text written with Beatrice Moulton, Bellow describes the effect of this notion on the lawyer's identity:

> In simple terms, a fully-socialized individual is one who is, does, and believes pretty much what society asks him or her to be, do and believe. The explanations focus on three key concepts: role—a socially generated set of expectations about one's behavior in specific situations; reference group—the audience (or audiences) to whom one looks for approval, support, acceptance, reward and sanction; and ideology—the constellation of beliefs, knowledge, and ideas which, in a given situation, serve to justify, legitimate and explain both role definitions and the allocation of reward and sanction power among reference groups. In the legal system (or any system of social relationships) role definitions, reference groups and ideology combine to produce a distinct legal subculture which powerfully influences the "professionalization" of young lawyers. Over time, professional roles become part (and sometimes a very large part) of one's identity.[23]

---

[19] William Pincus is generally credited with being the financial and instrumental father of clinical education.

[20] G. Bellow, *On Teaching the Teachers: Some Preliminary Reflections on Clinical Methodology* in CLINICAL EDUCATION FOR THE LAW STUDENT (CLEPR, 1973).

[21] Bellow & Johnson, *Reflections on the University of Southern California Clinical Semester*, 44 S. CAL. L. REV. 664 (1971).

[22] G. BELLOW & B. MOULTON, *supra* note 9.

[23] *Id.* at 11-12.

Thus, the individual attorney must locate herself within a professional context, examine the expectations of her role and choose whether or not to conform to those expectations. These role expectations are derived from the individual lawyer's functions and purpose as perceived by the lawyer herself, her peers, judges, clients and other members of the community who constitute the reference group.

The separation of professional functions into discrete areas or processes permits generalizations to be made about each of the functional "hats" or roles that a lawyer must perform. Bellow and Moulton liken the lawyer's roles to those of actors in a theatrical production.[24] By studying the character (*i.e.*, the part or role of interviewer in the initial lawyer-client contact), the actor can master its constituent elements, its essence and its gestalt, and thereby learn to perform the role.[25] Thus, the lawyer's professional life can be divided into distinct roles such as the interviewer,[26] planner,[27] investigator,[28] negotiator,[29] examiner or interrogator,[30] advocate, debater[31] and counselor.[32] In this way, the particular skills or talents which are necessary for each role can be analyzed, conceptualized, practiced and mastered.

When the various roles are dissected, patterns begin to emerge. For example, as interviewer, investigator, negotiator and examiner, the lawyer must ask questions. Recognition of this particular skill requirement enables the lawyer to categorize the types and kinds of questions to ask in particular contexts. Thus, the "logic of question-framing" is born as a conceptual model of what lawyers do. When should an open-ended question be used? When is a leading question more appropriate? What are the effects of such questions on information acquisition? How does the form of question affect the client, the fact-finder and the lawyer's conceptualization of what she does?

The lawyer, thus, begins to learn about what she does by considering the roles she plays, examining what skills are necessary to play those roles, analyzing the constitutent elements of those skills and finally, evaluating which elements of each skill can be used for what purposes and with what effects. This model of examining what a lawyer does is simultaneously procedural, instrumental and evaluative. It causes the lawyer or clinician to ask a series of analytic questions about what the

[24] *Id.* at XIX-XXV.

[25] *Id.*

[26] *Id.* at 104-272.

[27] *Id.* at 273-429.

[28] *Id.*

[29] *Id.* at 430-606.

[30] *Id.* at 607-825.

[31] *Id.* at 826-965.

[32] *Id.* at 966-1104.

individual seeks to achieve, what is needed to accomplish these things and how well adapted the means chosen are for the ends desired. The Bellow and Moulton scheme of dividing the lawyering process into constitutent roles, skills, models and issues proceeds in similar fashion for all of the attorney functions.[33]

B. *Conceptualization of the Lawyer's Skills*

Perhaps the most sophisticated conceptualization of the lawyer's skills has been undertaken by one of the other "elder" statesmen of the clinical movement, David Binder, and his colleagues in the UCLA clinical program.[34] In their view, the lawyer's role is simply, but effectively to assist the client in the achievement of some client-defined goal.

Binder argues that the lawyer must develop the most effective skills to effectuate the client's purpose. Thus, in the initial interview with a client, the lawyer must provide the client with the opportunity to self-define her goals and concerns. The lawyer must then employ her professional skills to learn the relevant facts in the most efficient and logical manner.[35] When the clinician considers how best to acquire these facts in an initial client contact, she is conceptualizing about order, logic and purpose. In the litigation context, it is likely that a particular transaction, occurrence or event "caused" the litigation; therefore, the best way to proceed in such an interview is to undertake an exhaustive chronological exposition of the cause and its effects.[36] In the non-litigation context, the facts might better be acquired in topical order. For example, in estate planning the interview might focus first on family structures, then on assets and finally on dispositional desires.

Similarly, in counseling, Binder argues that the lawyer must facilitate the client's decision-making process[37] since the client must live most

[33] *See* notes 26-32 *supra* and accompanying text. In addition to this micro analysis, Bellow and Moulton view the lawyering process as including a view of the lawyer acting within a larger system, more specifically the profession's moral and ethical constraints. These constraints may affect the attorney's sense of her role, what skills will be used or not used and which means or ends will be permissible and which will not. Because this approach to the question of what a lawyer does includes macro analysis, discussion will be deferred to that section. *See* notes 82-92 *infra* and accompanying text.

Conversations I have had with Gary Bellow and Beatrice Moulton subsequent to the publication of their book have led me to believe they would prefer to be considered as expressing a more macro-societal and substance-oriented perspective and would now write a different book.

[34] The conception of and analysis for this article preceded my affiliation with the UCLA clinical program. I must confess, however, to a possible bias in discussing the contributions of the UCLA clinicians since this article was written in the shadow of the light of one year's influence.

[35] D. BINDER & S. PRICE, *supra* note 8, at 6-134.

[36] *Id.* at 53-75.

[37] *Id.* at 135-223.

closely with the decision. With this purpose in mind the attorney can use his or her skill and knowledge to assist the client in developing the best data base from which to choose and assess the available alternatives. Thus, the lawyer will present the possible legal and economic consequences of each alternative, while the client will present and assess the personal and social consequences of each alternative. This conceptualization of what the lawyer does and what she is trying to accomplish permits categorization of tasks, duties, information and the criteria for choosing from among the types of tasks, duties and information.

This analysis has also been applied to the lawyer's role as advocate in the decision-making process in which a fact-finder must choose between two competing versions of the facts.[38] By systematically exploring the fact-finding mechanism, the clinician considers the lawyer's role in the process. A close examination of this process reveals that the fact-finder assimilates the factual presentations of a case to his knowledge and experience of the world. Therefore, the lawyer must take care to present the facts in terms of the premises or generalizations on which she thinks the fact-finder bases his factual evaluations. If this is not possible, more proof, evidence or argument may be necessary to persuade the fact-finder to accept a version of the facts based on a different set of premises or generalizations, or the premises or generalizations may themselves have to be modified.

With a similar *modus operandi* Paul Bergman has suggested an approach to develop a sense of purpose in cross-examination.[39] Instead of learning through the folklore of the discipline, clinical students should be taught to think about their goals in cross-examination and to deduce the principles by which to achieve them.[40] Thus, if the purpose of a cross-examination is to develop evidence, proof, arguments or inferences that support one view of the world rather than another, the lawyer can begin to construct a logic of questioning that is informed by a measurement or calculus of risk. Although an adverse witness may be personally unknown to the cross-examiner, her relationship to one view of the world can be anticipated (*i.e.*, the opposing side's version of the case). Thus, if the lawyer can rebut a "bad" answer by extrinsic evidence from her own factual perspective (*i.e.*, another person or an inconsistent statement), a question to that witness will be relatively safe. Bergman uses this reasoning to create a "safety model" for cross-examination that helps the lawyer to understand her goals, and role as

---

[38] D. Binder & W. Graham, Deductive Reasoning in the Proof of Facts (1979) (on file with the author).

[39] Bergman, *A Practical Approach to Cross-Examination: Safety First*, 25 U.C.L.A. L. REV. 547 (1978).

[40] *Id.* at 548-49.

trial advocate, to conceptualize about a particular process, and to evaluate her choices and performance.[41]

The substantive principles described above are not nearly as significant as the process by which they are derived. The lawyer's purpose, role and skill—the components of her craft—are closely scrutinized, as if looked at through a microscope. By focusing intently on the elements of a particular role or skill, the clinician can frame concepts, generalizations and abstractions about that component of the lawyering process. By asking what the lawyer does, for what purpose and in what context, orienting models or conceptual frameworks can be developed for each of the lawyer's diverse skills and roles. Criteria can then be articulated to aid in making and evaluating behavioral choices.

These "models" of individual attorney skills are still in an early stage of conceptualization and development. Yet they offer great promise for explanations of lawyering behavior, not just for clinical instruction, but for our understanding of what, why and how lawyers do what they do.[42]

C. *Lawyer Decision-Making*

Other clinicians such as Anthony Amsterdam[43] have looked at the lawyer's decisions as the unit of analysis:

> What is the lawyer's role? What are the lawyer's goals? What are the available means for attaining those goals? What are the ingredients of judgment—of wise decision-making—in those choices? How are the lawyer's role, goals, means and decision-making processes affected by the structure of the legal institutions within which he works? And: how did you act or decide? What choices did that decision or action imply? What alternative courses were open? Why were they rejected, or not considered? In light of your objectives and resources, how could your process of decision making and responsive action be improved?[44]

This approach to studying lawyering behavior examines how choices are made in particular situations, evaluates the decision-making process

---

[41] *Id.* at 555-75.

[42] Other clinicians have also followed this method of analysis of the lawyer's tasks. *See, e.g.*, Schoenfield and Schoenfield, *Interviewing and Counseling Clients in A Legal Setting*, 11 AKRON L. REV. 313 (1977); G. Lowenthal, A General Theory of Negotiation Process, Strategy and Behavior (forthcoming, on file with the author).

[43] Anthony Amsterdam has written a number of articles concerning criminal law. *See generally* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974). Beginning in 1972, while at Stanford, he undertook the responsiblity for updating TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES.

[44] A. Amsterdam, Memorandum to Stanford Law School Faculty (July 27, 1973).

and compares the decisions to alternative possibilities. This is similar to the analysis that is utilized when one evaluates how a court arrived at a particular result among competing choices as shaped by precedent, factual presentation, evidence and policy considerations.

The analysis of a lawyer's decisions can draw from the decision-making literature in other disciplines[45] as well as from the numerous accounts of legal strategies and choices in real cases.[46] Theories can then be formulated which tie together discernible patterns discovered in the decision-making process.

The potential for such analysis, given the clinician's rootedness in legal practice where scores of attorney decisions are made daily is enormous. Clinicians who employ simulation methodologies have an unparalleled opportunity to study and test the factors that affect lawyer decision-making under almost perfect laboratory conditions. Indeed, clinicians are in an excellent position to test theories about lawyer behavior that come closest to the scientific method Langdell envisioned for law study.[47] By observing simulated attorney interactions and tasks, clinicians can begin to deduce patterns, rules and explanatory models of lawyer decision-making. There is a possibility for a new empiricism about lawyering that, while borrowing heavily from the Legal Realists,[48] focuses more directly on lawyers who make millions of law-making, office[49] and litigation decisions every day rather than on judges, legislatures and agencies more commonly treated in the literature as legal decision-makers.

Indeed, this focus on lawyer decision-making broadens our understanding of how the legal system operates. If the analysis is to be meaningful, such studies must consider: the fluidity of facts and information at the lawyer's disposal; the impact of resource scarcity and allocation decisions on the lawyer's choices; the input of clients, opposing counsel and judges into the individual attorney's choices; as well as limitations based on substantive doctrine and professional norms. Thus, by focusing on the lawyer's decisions as a question of theoretical interest, clinicians can study not only how strategic choices are made, but also the behavioral models and implications of decisions in the broader context of the legal system. By closely examining the factors which influence an attorney in choosing between alternatives, such as whether

[45] *See, e.g.*, G. SCHUBERT, JUDICIAL DECISION MAKING (1963); T. SORENSON, DECISION MAKING IN THE WHITE HOUSE (1963); Simon, *Rational Decision Making in Business Organizations*, 69 AMERICAN ECON. R. 493 (1979).

[46] *See, e.g.*, Meltsner, *Litigating Against the Death Penalty: The Strategy Behind* Furman, 82 YALE L.J. 1111 (1973).

[47] *See, e.g.*, Wizner and Curtis, *Here's What We Do: Some Notes About Clinical Legal Education*, 29 CLEV. ST. L. REV. 673 (1980).

[48] Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFFALO L. REV. 459 (1979).

[49] *See generally* L. BROWN & E. DAUER, *supra* note 8.

to litigate or settle, and by extending the scrutiny to aggregates of attorney decisions, it is possible to learn a great deal about why lawyers do what they do.

Working in this tradition of looking at attorneys as decision-makers, at least one clinical scholar has begun to formulate some normative ideas about how lawyers ought to make decisions.[50] Mark Spiegel has argued that if the nature of the lawyer's work is to make decisions for the client, the doctrine of informed consent, as applied to medical decision-making, must also be applied to legal decision-making.[51] Thus, if we focus on the content of the lawyer's decision it is too easy to designate some decisions as strategic and therefore must be left to the lawyer (such as the choice of forum, the proper legal claim to pursue, whether to demand a jury, whether to ask a particular question or call a particular witness) and others which involve the merits of the case and must be left to the client (such as decisions to litigate or settle).[52] If a client who participates in his case is more likely to achieve better results, as at least one study seems to indicate,[53] then there are instrumental and practical reasons to look more closely at the allocation of decision-making responsibility between lawyer and client. One can then examine the economic and normative implications of who should make what decisions in the lawyering context.

The importance of such theoretical inquires should not be underestimated. The theoretical questions or visions of each clinican can and have had a significant impact on the way law students and lawyers conceptualize and learn about the work and functions of a lawyer.[54] Given an emphasis on lawyer decision-making, students may learn to develop models for learning how to make, evaluate and critique their own decisions.[55] Thus, students, lawyers and clinicians will ask of themselves, throughout their careers, the questions posed in Amsterdam's memorandum.[56] From these inquiries, patterns and themes of attorney decision-making can be explored in the academy, the classroom and in the legal arena.

---

[50] *See* Spiegel, *supra* note 7.

[51] *Id.* at 49-67, 123-133.

[52] *See* ABA, CODE OF PROFESSIONAL RESPONSIBILITY EC7-7 (1978).

[53] D. ROSENTHAL, LAWYER AND CLIENT—WHO'S IN CHARGE? (1974).

[54] The ABA has recently attempted to adopt a clinical model for teaching young lawyers. *See* COMMITTEE ON PROFESSIONAL EDUCATION, ABA PILOT LAWYERING SKILLS INSTITUTE (1979-80).

[55] *See, e.g.*, the description of the University of Pennsylvania's clinical program in Spiegel, *The Penn Legal Assistance Office: Theory and Practice in Learning and Lawyering*, 13 THE LAW ALUMNI J. (1978-79) (University of Pennsylvania Law School).

[56] *See* note 44 *supra* and accompanying text.

D. *Lawyering As An Interpersonal Process*

When clinicians have asked the question, "What is it that lawyers do?", perhaps the most controversial answer has been that "lawyers interact with other people." In a growing body of literature, most clearly represented in the writings of the Columbia Law School's clinicians,[57] Thomas Shaffer,[58] Gary Goodpaster[59] and various psychiatrists and psychologists who have worked with clinicians,[60] the lawyer's roles have been described as interpersonal processes, characterized by interactions with lawyers, clients, judges and other actors in the legal system. At least one commentator has criticized this "psychologizing" of the lawyering process.[61] Yet this view of the lawyering process may also prove productive in analyzing reasons or explanations for what a lawyer does.

Many of these interpersonal theories of lawyering are derived from already existing theories of human and professional interaction developed in social psychology and sociology.[62] Indeed, the development of analogous theories in medical sociology[63] has far surpassed the formulation and acceptance of similar theories in the legal world. Whether

---

[57] I have identified the Columbia clinicians as Michael Meltsner, Philip Schrag, Holly Hartstone, and Jack Himmelstein, among others. *See* notes 69-70 *infra* and accompanying text for some of their writings.

[58] T. SHAFFER, LEGAL INTERVIEWING AND COUNSELLING (1976).

[59] Goodpaster, *The Human Arts of Lawyering*, 27 J. LEGAL EDUC. 5 (1975).

[60] *See, e.g.*, Redmount, *Attorney Personalities and Some Psychological Aspects of Legal Consultation*, 109 U. PA. L. REV. 972 (1961); Redmount, *Humanistic Law Through Legal Counseling*, 2 CONN. L. REV. 98 (1965); Watson, *Some Psychological Aspects of Teaching Professional Responsibility*, 16 J. LEGAL EDUC. 1 (1963).

[61] Simon, *supra* note 1. While I share some of Simon's views I believe he has committed the intellectual error of reductionism. As set forth, the "interpersonal process" theory of lawyering is only one of the theories being considered and developed by American clinicians. The impact of Rogerian therapeutic models of lawyering has been exaggerated by Simon. *Id.* at 51-52 n.93. It is my experience that to the extent such formulations are used at all, they are used in the interviewing segments of clinical courses. Yet, the more common model of clinical education is skills training as described in Section IB in the text. *See* notes 34-42 *supra* and accompanying text. Furthermore, the interpersonal school has been the most prolific in its writing, and thereby disproportionately represents the clinical theories about lawyering that have been published. *See, supra* note 2. This is not to deny or minimize the importance of this school of thought. The significance of caring for our fellow human beings in our service to them should never recede from the professional consciousness.

[62] *See, e.g.*, the symbolic interactionist school of sociology: E. GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1959); E. GOFFMAN, STRATEGIC INTERACTION (1968).

[63] *See, e.g.*, the works of Eliot Friedson: E. FRIEDSON, DOCTORING TOGETHER (1975); E. FRIEDSON, PROFESSIONAL DOMINANCE (1970).

derived from humanistic psychology,[64] more traditional Freudian psychology[65] or sociology,[66] the common themes in these theories about the human interaction in the lawyer-client relationship, are the recognition of human needs to be satisfied, both on the part of the lawyer and the client, the need for effective communication skills, acknowledgment and tolerance of values, goals and purposes held by others,[67] and the recognition of the role of feelings in what we otherwise think of as a "rational" legal system.[68]

In their written works concerning the Columbia Law School's clinical program, Meltsner and Schrag have described the use of group dynamics theory and practice as a means of focusing on the lawyer's interactions with others.[69] Their conviction that it is important for lawyers to step back and reflect on how they interact with others led them to test their theories by attempting replication or simulation of the human dynamics of the attorney-as-negotiator role in the student-teacher relationship.[70] The student is required to negotiate for instructor supervision and, in so doing, is expected to abstract and generalize from this experience in order to generate principles which will lead to a successful negotiation with opposing counsel. Thus, the student learns to share information, to express needs, to bargain for what the other side desires and to confirm agreements.

By focusing on the attorney-client interpersonal process, clinicians have developed theories about what motivates participants in the legal system,[71] what lawyers are able to do and what must or might be left to others. This focus on the interpersonal process of lawyering has obvious

---

[64] *See* C. ROGERS, ON BECOMING A PERSON (1961); Himmelstein, *Reassessing Law Schooling: An Inquiry Into The Application of Humanistic Educational Psychology to the Teaching of Law*, 53 N.Y.U.L. REV. 514 (1978).

[65] *See* Watson, *supra* note 50.

[66] *See* E. GOFFMAN, *supra* note 62; E. FRIEDSON, *supra* note 63.

[67] *See* D. BINDER & S. PRICE, *supra* note 8 at 6-7.

[68] I have always disliked the distinction between the rational mode (thought, idea) and the irrational or arational mode (emotion, feeling). If feelings are appropriate to the situation—*e.g.*, grief after death—then they are quite rational. Similarly, we have long had an emotional attachment to our ideas. For further discussion of these views see C. Menkel-Meadow, *Women As Law Teachers: Toward the Feminization of Legal Education*, in MONOGRAPH III HUMANISTIC EDUCATION IN LAW (Columbia Univ. 1980).

[69] M. MELTSNER & P. SCHRAG, PUBLIC INTEREST ADVOCACY: MATERIALS FOR CLINICAL LEGAL EDUCATION (1974); M. MELTSNER & P. SCHRAG, TOWARD SIMULATION IN LEGAL EDUCATION (1979); Meltsner and Schrag, *Report from a CLEPR Colony*, 76 COLUM. L. REV. 581 (1976); Meltsner and Schrag, *Scenes from a Clinic*, 127 U. PA. L. REV. 1 (1978).

[70] Meltsner and Schrag, *Scenes from a Clinic*, *supra* note 69 at 21-25.

[71] D. BINDER & S. PRICE, *supra* note 8; Goodpaster, *supra* note 59; T. SHAFFER, *supra* note 49.

implications for determining what is lawyer's work.[72] But, aside from the now trite question about whether a lawyer can or should be a social worker or psychiatrist, this aspect of the lawyer's work is in many ways most complex,[73] and very intimately related to questions not only of professional role or status but to issues of professional ethics and liability as well.[74] To what extent should lawyers be liable for their failures at interpersonal relations in the lawyer-client context, especially where such failures of communication have led to unsuccessful and perhaps preventable legal or judgmental errors? To what standard of care, training and expertise should lawyers be held in all of their interpersonal roles—advisor, counselor, negotiator, friend, etc. It is certainly important to look at these questions, speculate on the possibilities and ask other actors in the legal system—clients, judges, opposing counsel and adversary parties—what is expected or desired as clinicians formulate standards for professional conduct.[75] Examination of one's professional self-concept and behavioral standards both as teachers and as students can only result in more effective delivery of legal services by forcing more honest appraisals of our professional identities.[76]

Thus, as is the case with all of the questions posed by the micro-theories of lawyering, when we examine the question of what a lawyer does, the answers are not really as limited, instrumental or individualistic as they might seem. In the interpersonal process school of clinical education, the questions asked are not only what will work best for this lawyer with this client, but also how should the attorney act with her clients and adversaries, and what are the implications for such theories of interaction for the legal profession at large. In short, when analyzing the means used by lawyers in interactions with others, we must inevitably come to grips with what ends will be served as individual attorney interactions aggregate and proliferate out into the larger system. Clinicians, by being in a position to critically observe a large and yet controlled number of interactions, have an ideal vantage point for reflection on the dynamics of the lawyering process and its implications for the legal system.

---

[72] Q. JOHNSTONE & D. HOPSON, LAWYERS AND THEIR WORK (1967).

[73] It is not unlike deciding when a lawyer ceases to be a lawyer, and begins to act as a business partner or advisor.

[74] G. HAZARD, ETHICS IN THE PRACTICE OF LAW 58-59 (1978).

[75] This seems particularly appropriate at this time since the proposed ABA Model Rules of Professional Conduct divide the lawyer's ethical obligations into categories, defined, in large part, by the interpersonal processes in which the lawyer is engaged. *See* ABA, PROPOSED MODEL RULES OF PROFESSIONAL CONDUCT (1980); Schwartz, *The Death and Regeneration of Ethics (1980)*, ABF. RESEARCH J. (1980).

[76] *See* L. DVORKIN, J. HIMMELSTEIN & H. LESNICK, BECOMING A LAWYER: A HUMANISTIC PERSPECTIVE ON LEGAL EDUCATION AND PROFESSIONAL IDENTITY (1980).

E. *The Meta-Learning of Lawyering*

The work of Robert Condlin and others at the Harvard clinical program, while associated with the Harvard School of Education,[77] while most often associated with the pedagogical and methodological theories and debates about clinical education, also contributes to the "micro" theories of lawyering. One of Condlin's major theories is that law students learn how to learn in the law school in a competitive and persuasive mode rather than in a collaborative and additive mode.[78] This learning mode replicates itself as law students learn each new aspect of their lawyering roles—how to brief and argue cases, how to argue with their professors and later their judges, how to communicate with their classmates and later their peers in the legal system, how to deal with more material than can possibly be absorbed and later how to handle cases that could fill up more than all of the available time.[79] Thus, if we look at the learning process of lawyering we will learn not only how to structure curricula but also how the socialization of the law school and its teaching is replicated and patterned in the socialization of the legal system and its participants. Clinicians, by examining their own processes as legal educators, can generalize and theorize about how their students will behave as lawyers. Learning becomes a metaphor for lawyering. Because the professional behavior of lawyers as practitioners is patterned on their prior learning experience, the present learning experience can be seen as establishing patterns for subsequent professional behavior as practitioners and educators. The practitioner acts as an educator when, for example, a counseling session becomes one in which the lawyer "educates" the client about available alternatives. This process contains the same manipulative potential that the teacher may use on the student for educational purposes. In similar fashion the lawyer may educate judges in court appearances, opposing counsel in negotiating sessions, and ultimately herself in general practice. Thus, this "school" of clinical thought looks at lawyering as a process within a system which, by its nature, structures learning and thereby shapes the behavioral repertoire.

F. *Summary*

From the above discussion, certain common themes that have emerged from the "micro" theories of lawyering can be identified. While micro theories focus on the individual lawyer's behavior and roles, they

---

[77] Described by Bolman, *Learning and Lawyering: An Approach to Education in Legal Practice* in ADVANCE IN EXPERIENTIAL SOCIAL PROCESSES (Cooper and Aldererfer eds. 1979).

[78] Condlin, *Socrates' New Clothes: Substituting Persuasion for Learning in Clinical Practice Instruction*, 40 MD. L. REV. 223 (1981).

[79] *Id.*

must of necessity confront the "macro" implications of how the legal system will be effected by aggregations and proliferations of individual attorney behavioral choices. Thus, if the unit of analysis is theories about how an individual attorney negotiates, one must account for the limitations of this particular role or function within the legal system. What skills the attorney will employ (making a first offer, making principled movements),[80] what interpersonal processes the attorney will employ (reasonable or unreasonable behavior, cooperative or competitive style), how the attorney will educate herself, and her opposing counsel about the case, what decisions the attorney will make and why, are decisions which will necessarily be affected by the legal context in which they are made.[81] Inevitably, the attorney must determine what she is trying to accomplish in the case, how the legal system permits or limits achievement of such goals, and what impact the choices made in this case will have on future choices to be made by other lawyers in other cases.

Whether the micro theorists address these latter questions directly or leave them to the macro theorists, it is useful to our understanding of what lawyers do that such questions be examined, tested, written about, and ultimately taught to our students. For as legal education and legal scholarship has thus far focused on theories of institutional decision-making and choices, the focus on individual lawyer choices, decisions and behaviors described by clinical micro theorists will add to our understanding of the legal system.

III. MACRO THEORIES: THE LEGAL PROFESSION—OF PURPOSES, POWER, STRUCTURE AND SUBSTANCE

In studying what lawyers do, some clinicians have begun to analyze the larger impact of the aggregate of attorney functions. What does the legal profession provide for society? What can a lawyer do for her client that cannot be done as well by the client himself? Once again, the clinician has an excellent vantage point from which to ask such questions and examine the answers. As both a working professional and a scholar or expert on the legal system, the clinician can view the aggregate impact of the individual lawyer on the legal system and, conversely, the legal system on the lawyer. Indeed, the clinician is ideally situated in time and place to develop a legal sociology or anthropology utilizing a combination of theoretical and empirical explorations in the fieldwork necessarily engaged in by most clinical programs. What then do clinicians have to say about the operation of the legal system from their perspective as philosophers-servants?

---

[80] C. Menkel-Meadow, Toward Another View of Legal Negotiation (unpublished, on file with author).

[81] Such as whether the negotiation is prelitigation or not. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669 (1978).

A. *Purpose—Resolving Disputes, Planning Transactions or Effecting Social Change?*

Those who have written about the appropriate function of the lawyer have argued that the lawyer is a loyal friend to her particular client, or a facilitator of the client's wishes, an agent of needed social change, a planner of transactions, or a dispute resolver. The arguments continue within the curricula of most clinical programs but without much edification by those who are best able to analyze lawyers' actions and comment on their effectiveness. The current trend in legal scholarship appears to be the comparison of the adversary system[82] with more participatory and less antagonistic systems of justice and dispute resolution.[83] Too little is heard about the purpose or functions of the legal system from those who have the best data base from having participated in, and have trained students to participate in, the legal system.

Bellow's clinical teaching, unlike that of other clinicians, has been inspired by a political vision. He has come from the legal services and public defender tradition[84] and views law as a means for promoting *more* justice in our world—economic, political and social—particularly on behalf of the poor and under-represented. Bellow's recent writing and work[85] has been devoted to maximizing the effectiveness of achieving these ends. In describing the patterns of legal service practice, Bellow finds that the practice has become routinized; clients are being manipulated[86] into accepting minimal results; settlements, acquiescence and conciliation are the norm rather than protest and contested lawsuits; and that lawyers fail to exercise their creative skills to engage in preventive law but rather focus exclusively on the initial problem presented to them.[87] Although Bellow is critical, he offers solutions for how lawyers might be more effective—solutions which come from a slightly broader and expanded notion of the skills he teaches clinical students. Lawyers must aggregate their clients, not necessarily in the legal class action form, but by analyzing patterns that exist in the legal problems they present.[88] Lawyers must adopt new strategies for select-

---

[82] *See* M. SCHWARTZ, LAWYERS AND THE LEGAL PROFESSION (1979); Simon, *supra* note 3.

[83] R. Abel, *supra* note 3.

[84] CLEPR, FOURTH BIENNIAL REPORT 1975-76 (1976).

[85] *See* G. Bellow, Proposal for Legal Services Institute (1978) (on file with author).

[86] Goffman terms this process of manipulation as being "cooled." *See* E. GOFFMAN, *supra* note 62.

[87] Bellow, *Turning Solutions Into Problems: The Legal Aid Experience*, 34 NLADA BRIEFCASE 106, 108-09 (1977).

[88] *Id.* at 119-22.

ing the cases they work on and what remedies they seek. They must ask themselves what they are trying to accomplish in larger terms for their clients rather than mechanistically apply their skills. They must perhaps learn new skills—organizing their clients, aggregating claims without using class actions—and reconsider their roles within the profession. Both in the Lawyering Process text,[89] co-authored with Beatrice Moulton, and in a subsequent article co-authored with Jeanne Kettleson,[90] Bellow explores how the contours and requirements of the Code of Professional Responsibility may affect such an expanded notion of the function of the legal services lawyer.

Bellow's focus on the political nature of lawyering and its direct relationship to the maldistribution of resources in this country, has been echoed by nonclinical authors writing on the connections between the social and legal structures.[91] Thus, Bellow's writings and thought forces one to step back from the micro view of an individual attorney in his role in solving client problems or planning transactions, and asks us to consider what purpose is served by what lawyers do. The lawyer's role and function in society must be vigorously debated as we develop theories and methods for teaching law students to be lawyers.[92]

B. *The Clinical Study of Legal Institutions and Substantive Law*

Many years ago, the Legal Realist movement attempted to close the gap between the law that is studied—appellate decisions—and the law that exists in actual practice—trial courts and law offices—by initiating studies of the legal system through both theoretical works[93] and empirical studies.[94] One might expect that clinicians would continue this tradition since it affords students of the legal system a unique opportunity to study the law, observe its application in action, and examine its impact on the protected classes, prohibited actors, enforcers and clientele affected by the laws.[95]

While some clinical programs have combined a study of substantive

---

[89] G. BELLOW & B. MOULTON, *supra*, note 9.

[90] Bellow & Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 1978 B.Y.U. L. REV. 337.

[91] Simon, *supra* note 1. *See also* J. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA (1976); R. Abel, *supra* note 3.

[92] Other authors addressing the question of the appropriate function of the lawyer have argued that the lawyer is merely a facilitator of the client's wishes. *See* T. SHAFFER, *supra* note 58; Fried, *supra* note 11; Binder, *supra* note 8.

[93] J. FRANK, COURTS ON TRIAL (1969).

[94] Schlegel, *supra* note 48.

[95] For one suggestion of how this might work, see Sparer, *The Responsibility of Law Teachers*, 53 N.Y.U.L. REV. 602 (1978).

doctrine with field work experience,[96] few have utilized the opportunity to do more than study, in traditional fashion, the policy considerations implicated in legal doctrines.[97] Instead, the clinician's skills would be better employed by analyzing the impact particular rules have on the people involved with that body of law.[98] Thus, a discussion of the policy considerations connected with employer financed unemployment compensation programs might also consider the effects of such financing on the burden of proof, motivation to contest a determination, appearances at the hearings, control over the production of evidence and recovery rates.[99] In this way the clinician could bridge the gap between the law as written and the law as experienced by the actors in the legal system. Our understanding of the role of law and lawyer in society would be broadened by a sustained and rigorous analysis of the relationship of the different levels of the legal system to each other.

These suggestions have implications not only for the development of clinical themes in scholarship, but for the nature of clinical education as well. Most modern clinical programs will be forced to decide between two lines of development; to offer traditional process or skills courses, such as interviewing, negotiation, counselling and trial advocacy, or to develop substantive courses with clinical or fieldwork components, where the primary purpose is the study of the law and its doctrine in the context of the relevant legal institutions. Obviously, the two approaches are not mutually exclusive, but where resources are scarce and there is a desire for planned programatic and intellectual development, the choice may have to be made.

C. *The Clinician as Empiricist*

As an instructor and practitioner, the clinician has a unique opportunity to study the legal profession as an ethnomethodologist—that is, a participant observer.[100] The clinician, by observing and capturing thousands of data on the legal profession every year, has a rich opportunity for a systematic behavioral examination of the participants in and the structure of the legal system. The case study analysis of legal services work by Bellow and Kettleson is one example of such work.[101]

---

[96] Clinical courses at various law schools (*i.e.*, New York University, University of California at Los Angeles, Rutgers, Ohio State, Columbia, Stanford) have been offered in the substantive areas of Criminal Law, Consumer Law, Welfare Law, Administrative Law, and Women's Rights, to name a few.

[97] *See, e.g.*, Elson, *A Common Law Remedy for the Educational Harms Caused by Incompetent or Careless Teaching*, 73 NW. L. REV. 641 (1978).

[98] *See, e.g.*, J. NOONAN, PERSONS AND MASKS OF THE LAW 111-51 (1976).

[99] *See* Lesnick, *Reassessing Law Schooling: The Sterling Forest Group*, 53 N.Y.U.L. REV. 565 (1978).

[100] H. SCHWARTZ & J. JACOBS, QUALITATIVE METHODS IN SOCIOLOGY (1979).

[101] G. Bellow and J. Kettleson, Criteria for Case File Evaluation (on file with the author).

Evaluation studies of lawyer practice routines and alternative forms or types of practice is another example. In my own empirical work, I am studying how attorneys in a nonmarket context (legal services attorneys) allocate scarce legal resources.[102] There are a variety of such questions which could be subjected to this rigorous field and empirical analysis by clinicians with available data bases. Clinicians need only ask the right, *i.e.*, most interesting questions, about lawyers and our legal system and then operationalize those questions in the field.

D. *Professional Norms: Ethical and Moral Codes*

Given the timeliness and significance of questions about our rules of legal ethics,[103] clinicians would seem to be particularly well qualified to offer analyses and suggestions for appropriate rules of conduct applicable to different kinds of lawyering situations. The work of Bellow and Moulton,[104] Bellow and Kettleson,[105] and Spiegel[106] seems to point us in this direction. Yet clinicians still need to consider whether the categories of lawyering functions and clientele served established by the present Code or the proposed Model Rules[107] adequately provides for the diversity of legal functions, professional services and client needs. At the very least, the subject matters and geographic areas we serve may reveal useful information about the allocation of legal services. Although clinicians can prepare law students to work in areas of greatest need this is only part of our function. Clinical teachers and scholars should also explore alternative methods of delivering legal services and of structuring our profession, particularly in controversial areas such as judicare,[108] mandatory pro bono work,[109] and lay or paralegal representation projects. There is no end to the policy issues effecting the practice of law that clinicians might profitably and intelligently address.

IV. CONCLUSIONS AND SUGGESTIONS FOR THE FUTURE

This essay has examined the contributions that have come from various clinical "schools of thought" to the theories about lawyering. These can be broadly categorized by their emphasis on the role of the

---

[102] Menkel-Meadow and Meadow, *The Allocation of Legal Resources in a Non-Market Context*, NSF Grant #SES-8020373 (July 1, 1980).

[103] New rules of professional conduct are presently being considered. *See* note 109 *infra* and accompanying text.

[104] G. BELLOW & B. MOULTON, *supra* note 9.

[105] G. BELLOW AND J. KETTLESON, *supra* note 101.

[106] Spiegel, *supra* note 7.

[107] *See* note 75 *supra* and accompanying text.

[108] S. BRAKEL, JUDICARE PUBLIC FUNDS, PRIVATE LAWYERS AND POOR PEOPLE (1974); LEGAL SERVICES CORPORATION, DELIVERY SYSTEMS STUDY (1980).

[109] ABA, PROPOSED MODEL RULES OF PROFESSIONAL CONDUCT (1980).

individual attorney or on the profession in general. Although the line of demarcation between "micro" and "macro" theories of lawyering is artificially drawn, it is useful for clinicians to identify the academic and practical issues the discipline raises, and thereby to determine which themes or disciplines the clinician can comfortably address.

While the exclusive focus on Maslowian survivial needs[110] may not be totally supplanted, the time has come for clinicians to address the serious issues of the process and substance of lawyering. The time has come to share what has been learned from clinical programs with both fellow clinicians and other members of the legal profession. Although the clinical movement has come of age as an educational medium, it remains in its infancy in legal scholarship. This is especially true of its potential contribution to a better understanding of the lawyer's role in contemporary society. If there is any legacy clinicians can offer to the future of legal education, it is to encourage the study of lawyering as a subject worthy of serious inquiry in our institutions of legal education. Although clinicians may on occasion disagree with one another and with non-clinical legal educators, the free exchange of ideas should foster a climate of experimentation and intellectual growth that will promote the development of more informed and effective teachers and practitioners.

[110] For too long clinicians have been focused on their "lower" survival needs, and have neglected the expression of their "higher" aspirations and values. A. MASLOW, THE FARTHER REACHES OF HUMAN NATURE (1971).